

LEXSTAT 38 NJR 1515(A)

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RULE PROPOSALS

LABOR AND WORKFORCE DEVELOPMENT DIVISION OF TEMPORARY DISABILITY INSURANCE DIVISION OF WORKERS' COMPENSATION

38 N.J.R. 1515(a)

Proposed New Rules: N.J.A.C. 12:18-1.7 and 12:235-3.16

Non-Duplication of Benefits Under the Temporary Disability Benefits Law and the Workers' Compensation Act; Temporary Disability Benefit Liens in Workers' Compensation Cases

Authorized By: A.J. Sabath, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 34:1-20, 34:1A-3(e), 34:1A-12(b), 34:1A-12(c), 34:15-64 and 43:21-25 et seq.*, specifically, 43:21-65.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2006-113.

A **public hearing** regarding the proposed new rules will be held on the following date at the following location:

Monday, May 1, 2006

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by June 2, 2006 to:

David Fish, Regulatory Officer

Office of Legal and Regulatory Services

PO Box 110, 13th Floor

Trenton, New Jersey 08625-0110

Fax: (609) 292-8246

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The agency proposal follows:

Summary

The Department is proposing new rules at N.J.A.C. 12:18-1.7 and 12:235-3.16, which would establish procedures for handling cases where claimants have pursued temporary disability benefits under both the Temporary Disability Benefits Law, *N.J.S.A. 43:21-25*, et seq. (hereafter referred to as the "TDBL") and the Workers' Compensation Act, *N.J.S.A. 34:15-1*, et seq. (hereafter referred to as the "WCA"). *N.J.S.A. 43:21-30* expressly prohibits the payment of benefits for the same period of disability under both the TDBL and WCA, a concept commonly referred to as "non-duplication of benefits." *N.J.S.A. 43:21-30* further indicates that where an individual's claim for temporary disability benefits under the WCA is contested (where the work-relatedness of the disability for which the claimant is seeking temporary workers' compensation benefits has yet to be determined), the Division of Temporary Disability Insurance or the private plan disability carrier, as the case may be, may pay benefits to the individual where that individual would otherwise (but for the possible work-relatedness of the disability) be eligible for benefits under the TDBL. Also, pursuant to *N.J.S.A. 43:21-30*, where workers' compensation benefits are subsequently awarded for weeks with respect to which the claimant has received benefits under the TDBL, the Division of Temporary Disability Insurance or the private plan disability carrier, as the case may be, is entitled to be subrogated to the individual claimant's rights in the workers' compensation award to the extent of the amount of disability payments made under the TDBL. These general precepts (such as "non-duplication of benefits" and "right of subrogation"), as set forth in law, govern the interaction between the two disability programs. However, the specific method for processing claims where benefits are being sought under both the TDBL and the WCA and, furthermore, the specific means for determining whether a temporary disability insurance lien (predicated on the statutory subrogation right held by the Division of Temporary Disability Insurance or the private plan disability carrier) is properly payable, are not set forth in the law. The method traditionally employed by the Division of Workers' Compensation and the Division of Temporary Disability Insurance for handling these sorts of cases, discussed in detail below, is a matter of long-standing practice within the Department. It is through this rule proposal that the Department intends to memorialize that long-standing Department practice.

With regard to the Department's authority to promulgate such rules, the holding in *City of Hackensack v. Winner*, 82 N.J. 1 (1980) is instructive. That case involved conflicting decisions by two State administrative agencies arising from their separate handling of a single controversy over which each had apparent jurisdiction. *Hackensack, supra.*, at 2. The case originated with a dispute between a municipality, the City of Hackensack, and several of its civil service employees, firefighters claiming that they had been improperly denied promotions to the rank of lieutenant in the fire department. *Ibid.* The employees' complaints related to their merit and fitness for promotion and were thus governed largely by the civil service laws and the Civil Service Commission (now known as the Merit System Board) under Title 11 of the New Jersey Statutes. *Ibid.* The employees also asserted, however, that their promotions had been withheld because of their union activity. *Ibid.* In this respect, the claims were covered by the Public Employer-Employee Relations Act, *N.J.S.A. 34:13A-1* et seq., and subject to the jurisdiction of the Public Employment Relations Commission (PERC) under that act. *Ibid.* Separate actions were brought before each administrative agency by the firefighters with respect to their employment claims. *Ibid.* The two agencies, independent of one another, proceeded to adjudicate the matters in dispute and ultimately reached different findings of fact, arrived at dissimilar legal conclusions and imposed inconsistent administrative remedies. *Ibid.*

The Court in *Hackensack* ultimately determined that PERC should have "stayed its hand" at the threshold stages of the case as presented to it, explaining that although the controversy presented multiple and mixed issues involving statutory concerns of both agencies, the basic dispute involved primarily civil service law. *Id.*, at 47. In so deciding, the Court spoke of the need in such cases for administrative agencies to apply the principle of "administrative comity." Specifically, the Court stated,

[The] principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities that are also the appropriate statutory concern of other government bodies.

[Citations omitted.] This is a corollary application of the broader principle that where a court has concurrent, discretionary jurisdiction with another court or an administrative agency, the decision to exercise jurisdiction *vel non* should be fully responsive to the competence, expertise and status of the other tribunal. [Citations omitted.] Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise

to adjudicate the matter. *Id.*, at 43 (quoting, *Hinfey v. Matawan Region Bd. Of Educ.*, 77 N.J. 514, 531-532 (1978)).

Applying the standard enumerated in *Hackensack* to the instant matter, where the potential controversy at issue involves the concurrent jurisdiction, not of two "sibling agencies," but rather, of two divisions (Temporary Disability Insurance and Workers' Compensation) within the same administrative agency (Department of Labor and Workforce Development), the Department is well within its statutory authority to determine which Division (Temporary Disability Insurance or Workers' Compensation) is in the best position to adjudicate challenges to the amount of temporary disability insurance liens or other issues related to such liens, including disabilities covered by the liens and, further, to establish uniform procedures for processing claims where benefits are being sought under both the TDBL and the WCA; in particular, setting forth a uniform method for determining whether a temporary disability insurance lien (predicated on the statutory subrogation right held by the Division of Temporary Disability Insurance or the private plan disability carrier) is properly payable. It is, therefore, based upon the statutory authority granted the Department under both the TDBL and the WCA, and consistent with the principle of "administrative comity" discussed in *Hackensack*, that the Department proposes new N.J.A.C. 12:18-1.7 and 12:235-3.16.

N.J.A.C. 12:18-1.7 (12:235-3.16) would set forth the uniform procedures to be followed by both the Division of Temporary Disability Insurance and the Division of Workers' Compensation for handling cases where claimants have pursued temporary disability benefits under both the TDBL and the WCA. Much of the proposed new rules would mirror the provisions of *N.J.S.A. 43:21-30*, Non-duplication of benefits. However, in addition to setting forth the statutory right of claimants to file for temporary disability benefits under the TDBL while a contested workers' compensation claim is pending and the right of the Division of Temporary Disability Insurance or private plan disability carrier to be subrogated to the claimant's rights in any subsequent workers' compensation award to the extent of the amount of disability payments made under the TDBL, the proposed new rules would require that, under the circumstances outlined above, as a condition to receiving temporary disability benefits pursuant to the TDBL, a claimant would be required to sign a written subrogation agreement documenting that the claimant will pursue the workers' compensation claim and reimburse the Division of Temporary Disability Insurance or private plan disability carrier from the proceeds of any workers' compensation benefits the claimant subsequently receives based upon the same injury or illness as that for which the temporary disability benefits were obtained under the TDBL. The proposed new rules would also address the mechanism to be utilized by the Division of Temporary Disability Insurance or private plan disability carrier to ensure reimbursement; namely, the enforcement of a lien against a subsequent workers' compensation award.

Finally, N.J.A.C. 12:18-1.7 (12:235-3.16)(h) through (j) would establish the uniform procedures to be followed by both the Division of Temporary Disability Insurance and the Division of Workers' Compensation should a claimant wish to contest the amount of a temporary disability insurance lien or other issue related to the lien, including disabilities covered by the lien, where the claimant's workers' compensation case is pending. Specifically, under such circumstances, the claimant would be required to either (1) reimburse the amount of the temporary disability insurance lien as part of the workers' compensation award, order or settlement and then appeal the amount of the lien or such other issues related to the lien within 24 days from the date of the workers' compensation award, order or settlement, utilizing the appeal procedures set forth at *N.J.A.C. 12:20* (for liens arising from State plan and disability during unemployment benefits) or *N.J.A.C. 1:12A* (for liens arising from private plan disability benefits), or (2) immediately file an appeal of the amount of the lien or such other issues related to the lien utilizing the appeal procedures under *N.J.A.C. 12:20* (for liens arising from State plan and disability during unemployment benefits) or *1:12A* (for liens arising from private plan disability benefits), which appeal would stay the workers' compensation proceedings until the reimbursement issue is determined. The proposed new rules contain the necessary cross references to *N.J.A.C. 12:20* and *1:12A* and also contain the addresses to which claimants may direct appeals which pertain to the amount of a temporary disability insurance lien or other issue related to the lien, including disabilities covered by the lien.

Approximately 1,300 temporary disability insurance liens are filed per year by the Division of Temporary Disability Insurance against workers' compensation awards. During calendar year 2005, the Division of Temporary Disability Insurance recovered approximately \$ 5.65 million for the State plan and temporary disability during unemployment (4F) plans through the use of temporary disability insurance liens (this total does not include the amount recovered through such liens by private plans). Thus, the impact upon the temporary disability insurance trust fund of these liens is significant. The Department has a fiduciary duty to protect the fund and it is pursuant to that duty that the Department believes it is necessary to set forth in rule uniform procedures for processing claims where benefits are being sought under both the TDBL and the WCA; in particular, setting forth a uniform method for determining whether a temporary disability

insurance lien (predicated on the statutory subrogation right held by the Division of Temporary Disability Insurance or the private plan disability carrier) is properly payable.

The Department consulted with the Commissioner's Advisory Council on Workers' Compensation with regard to these proposed new rules.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed new rules would have a positive social impact in that they would provide clear direction to staff of the Division of Temporary Disability Insurance and the Division of Workers' Compensation, as well as to claimants, employers and private plan disability carriers, with regard to the uniform procedures for handling cases where claimants have pursued temporary disability benefits under both the TDBL and the WCA. It is for the benefit of all interested parties that the Department proposes to memorialize within rule its long-standing past practice and establish uniform procedures for handling such cases.

Moreover, the proposed new rules will ensure with regard to State plan claims that the Department of Labor and Workforce Development is fully equipped to discharge its fiduciary duty to protect the Temporary Disability Insurance Trust Fund (Fund), referred to within the Summary above. It is vital to the Department's role in this regard, that the Division of Temporary Disability Insurance have the clear authority to determine whether a temporary disability insurance lien, predicated on the statutory subrogation right held by the Division of Temporary Disability Insurance, is properly payable. Although there is a strong economic element to this impact of the proposed new rules, namely, the existence of an explicitly stated mechanism to recover moneys to which the Fund is entitled, the Fund itself serves a social purpose (to protect employees against the suffering and hardship generally caused by the loss of earnings due to non-occupational sickness or accident). To protect the Fund is to serve this same social purpose.

Economic Impact

As indicated within the Social Impact above, the proposed new rules will ensure with regard to State plan claims that the Department of Labor and Workforce Development is fully equipped to discharge its fiduciary duty to protect the Temporary Disability Insurance Trust Fund. It is vital to the Department's role in this regard, that the Division of Temporary Disability Insurance have the clear authority to determine whether a temporary disability insurance lien, predicated on the statutory subrogation right held by the Division of Temporary Disability Insurance, is properly payable. With regard to the economic impact on claimants, where the Division of Workers' Compensation honors a lien held by the Division of Temporary Disability Insurance or a private plan disability carrier against a workers' compensation award under the proposed new rules, there would obviously be a diversion of monies from the workers' compensation award to the Division of Temporary Disability Insurance or the private plan disability carrier. As indicated in the Summary above, however, *N.J.S.A. 43:21-30* states clearly and unequivocally that, "in the event that workers' compensation benefits . . . are subsequently awarded for weeks with respect to which the claimant has received disability benefits pursuant to this act (the TDBL), the State fund, or the private plan, as the case may be, shall be entitled to be subrogated to such claimant's rights in such award to the extent of the amount of disability payments made hereunder." Consequently, the diversion of monies from the workers' compensation award to the Division of Temporary Disability Insurance or the private plan disability carrier under the circumstances outlined in the proposed new rules is dictated by law.

Other than allowing the Department to effectively protect the Fund, the proposed new rules would have no economic impact in that they would simply establish uniform procedures for handling cases where claimants have pursued temporary disability benefits under both the TDBL and the WCA. Of particular interest to the Department, as indicated in the Summary above, the proposed new rules would memorialize a long-standing practice within the Department. The actual amount of benefits to which individual claimants are entitled would, of course, continue to be governed by the TDBL and the WCA. The proposed new rules are strictly procedural. Again, the Department does not anticipate that they will have any economic impact.

Federal Standards Statement

The proposed new rules are governed by *N.J.S.A. 43:21-25* et seq. and *N.J.S.A. 34:15-1* et seq., and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

Jobs Impact

The proposed new rules would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed new rules would impose no reporting, recordkeeping or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. Specifically, the proposed new rules simply establish an internal procedure for processing claims where benefits are being sought under both the TDBL and the WCA. The only parties affected by the proposed new rules in terms of compliance would be the Division of Temporary Disability Insurance and the Division of Workers' Compensation, both within the Department of Labor and Workforce Development, and private plan disability carriers, some of whom may be small businesses, who would benefit from the proposed new rules in the same manner as would the Division of Temporary Disability Insurance, which is to say, they would be fully equipped to protect their statutory right to be subrogated to a claimant's right to a workers' compensation award where that workers' compensation award is for weeks with respect to which the claimant has received disability benefits from the private plan disability carrier pursuant to the TDBL.

Furthermore, as indicated within the economic impact statement, it is not anticipated that the proposed new rules would have any potential adverse economic impact on businesses, including small businesses.

Smart Growth Impact

The proposed new rules would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

12:18-1.7(12:235-3.16) Non-duplication of benefits under the Temporary Disability Benefits Law, *N.J.S.A. 43:21-25* et seq. and the Workers' Compensation Act, *N.J.S.A. 34:15-1* et seq.; temporary disability benefit liens in workers' compensation cases.

(a) Administrative procedures for avoiding duplication of benefits in cases where claimants have pursued temporary disability benefits under both the Temporary Disability Benefits Law, *N.J.S.A. 43:21-25* et seq. (hereinafter referred to in this section as the "TDBL") and the Workers' Compensation Act, *N.J.S.A. 34:15-1* et seq. (hereinafter referred to in this section as the "WCA") are as follows:

1. Where a claimant has filed a claim petition under the WCA and where his or her claim is disputed or contested by the employer or its workers' compensation carrier in regard to whether temporary disability benefits are due to the claimant in workers' compensation, then such claimant may apply for temporary disability benefits under the TDBL and, if eligible, may receive temporary disability benefits as allowable by law during the pendency of the workers' compensation claim.
2. Where a claimant has not filed a workers' compensation claim and seeks benefits through the TDBL due to an alleged work-related condition, the Division of Temporary Disability Insurance or private plan disability carrier shall deny said benefits and inform the claimant that should he or she file a workers' compensation claim, benefits may be payable pursuant to the TDBL under (a)1 above.
3. As a condition to receiving temporary disability benefits under (a)1 above, a claimant shall be required to sign a written subrogation agreement which documents that the claimant will prosecute the workers' compensation claim and reimburse the Division of Temporary Disability Insurance or private plan disability carrier, as applicable, from the proceeds of any workers' compensation benefits the claimant subsequently receives based upon the same injury or illness as that for which the temporary disability benefits were obtained under the TDBL.

4. As a result of the subrogation agreement under (a)3 above, the Division of Temporary Disability Insurance or private plan disability carrier shall have the right to file a notice of lien with the Division of Workers' Compensation that shall apply against any workers' compensation award the claimant subsequently receives that is based upon the same injury or illness as that for which the temporary disability benefits were obtained under the TDBL.
5. Where the Division of Temporary Disability Insurance or private plan disability carrier has paid benefits to a claimant under the TDBL and later has reason to believe that the injury or illness upon which the TDBL benefits were based may also be compensable under the WCA, the Division of Temporary Disability Insurance or private plan disability carrier may file a lien against any workers' compensation claim.
6. Where a lien has been filed pursuant to (a)4 or 5 above, or where the parties and/or the Judge of Compensation become aware during workers' compensation proceedings that benefits had been paid under the TDBL, the Division of Temporary Disability Insurance or private plan disability carrier shall be reimbursed the amount of temporary disability benefits paid pursuant to the TDBL from any workers' compensation award, order, or settlement including lump sum or permanent disability benefits the claimant receives.
7. Where a claimant's workers' compensation award, order, or settlement after deductions for allowances totals less than the amount of the benefits paid under the TDBL, then the net amount due to the petitioner shall be reimbursed to the Division of Temporary Disability Insurance or private plan disability carrier in full satisfaction of the petitioner's obligation resulting from the written subrogation agreement.
8. Should a claimant wish to contest the amount of the lien or other issues related to the lien, including disabilities covered by the lien, the claimant shall either:
 - i. Reimburse the amount of the temporary disability insurance lien as part of the workers' compensation award, order or settlement and then appeal, pursuant to (a)9 and 10 below, such amount or other issues related to the lien within 24 days from the date of the workers' compensation award, order or settlement; or
 - ii. File an appeal, pursuant to (a)9 and 10 below, of the reimbursement amount or other issues related to the lien, which shall stay the workers' compensation proceedings until the reimbursement issue is determined.
9. The Division of Temporary Disability Insurance shall process appeals under this section in accordance with *N.J.A.C. 12:20* (for liens arising from State plan and disability during unemployment benefits) or *N.J.A.C. 1:12A* (for liens arising from private plan benefits).
10. Appeals filed under (a)9 above shall be directed by appellants to the following addresses, as appropriate:
 - i. For appeals arising from State plan temporary disability benefits:
Division of Temporary Disability Insurance
Attention: Appeal Unit
PO Box 387
Trenton, New Jersey 08625-0387
 - ii. For appeals arising from State disability during unemployment (4F) benefits:
Division of Temporary Disability Insurance
Attention: Disability During Unemployment Section
PO Box 956
Trenton, New Jersey 08625-0956
 - iii. For appeals arising from private plan temporary disability benefits:
Division of Temporary Disability Insurance
Attention: Private Plan Claims Review Unit
PO Box 957
Trenton, New Jersey 08625-0957